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State of New York Public Employment Relations Board Decisions from September 20, 2016

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State of New York Public Employment Relations Board Decisions from September 20, 2016

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**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6376

LOCUST VALLEY CENTRAL SCHOOL DISTRICT,

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

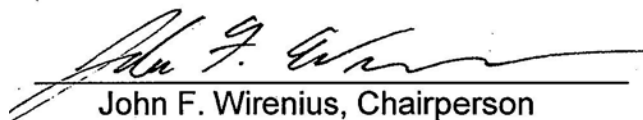
IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Cleaner, Automotive Servicer, Custodian, Groundskeeper, Automotive Mechanic Aide, Maintenance Helper, Maintainer, Automotive Mechanic, Mower Mechanic Groundskeeper, Assistant Head Custodian, Head Custodian I (Night) (High School), Head Custodian I (Elementary Complex), Custodian-Stock Assistant, Head Custodian II (High School), Cleaner-Bus Driver, and Maintenance Helper-Bus Driver.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 20, 2016
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

KEVIN BIEGEL,

Charging Party,

CASE NO. U-33607

- and -

CATSKILL HOUSING AUTHORITY,

Respondent.

KEVIN BIEGEL, Charging Party

**GLEASON, DUNN, WALSH & O'SHEA (LISA F. JOSLIN, of counsel), for
Respondent**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Kevin Biegel to a decision and order of an Administrative Law Judge (ALJ) dismissing his improper practice charge, in which he alleged that the Catskill Housing Authority (Authority) terminated his employment in violation of §§ 209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act).¹ The ALJ found that Biegel had established a *prima facie* case of retaliatory termination, but that he had not ultimately carried his burden of proving that the termination was motivated by his interest in joining or forming a union.

EXCEPTIONS

Biegel excepts to the ALJ's dismissal of the charge on several grounds. First, he contends that the "burden of persuasion has not been established by the respondents

¹ 49 PERB ¶ 4534 (2016).

as actions by the CHA, [and Authority Executive Director Nita] Blauberg do not substantiate legitimate business reasons.” Second, Biegel asserts that the ALJ erred in finding Blauberg’s testimony credible, specifically faulting the ALJ’s reliance on Blauberg’s demeanor. Biegel further disputes several of the ALJ’s factual findings and claims that extrinsic documentation is consistent with his claim that Blauberg’s initially high opinion of him was soured by his protected activity. Finally, Biegel claims that “it is not perceivable that a government agency would rule against a government agency,” and that “[t]his itself presents a conflict of interest” for this Board. For the reasons set forth below, we affirm the ALJ’s decision and dismiss the charge.

FACTS

The facts are fully set forth in the ALJ’s decision, and are discussed here only as far as is necessary to address the exceptions. On December 6, 2013, Biegel, a retired corrections officer, began his employment as a maintenance mechanic at the Authority. Because of Biegel’s status as a retiree, Blauberg sought a waiver pursuant to § 211 of the Retirement and Social Security Law in conjunction with Biegel’s employment. Biegel had been informed that his employment would be probationary for the first ninety (90) days.²

The Authority terminated Biegel’s employment effective February 20, 2014.

² Biegel contends that he never received documentary evidence of his probationary period, which he would have adduced to establish “that an employee cannot be terminated from employment before that period of time, as is my understanding.” (Brief in Support of Exceptions at 1.) In fact, “a probationary employee may be dismissed for almost any reason, or for no reason at all, and the employee has no right to challenge the termination in a hearing or otherwise, absent a showing that he or she was dismissed in bad faith or for an improper or impermissible reason.” *Hanson v. Cradell*, ___ AD3d ___, 141 A.D.3d 982, 36 N.Y.S.3d 298, 301 (3d Dept 2016) (quoting *Wilson v City of New York*, 100 AD3d 453 (1st Dept 2012)).

Blauberg testified to an array of performance deficiencies and to his excessive non-work related conversations, as well as to his complaining regarding aspects of the job that he was told about in the hiring process.

As the ALJ correctly summarized, Biegel's case is predicated on his testimony regarding his conversations with Blauberg:

Biegel testified that about a week before his termination from the Authority, he was in Blauberg's office discussing "the rights of call-in pay, being on call . . . in accord with New York State labor law." Biegel claimed in his testimony that Blauberg "became extremely defensive. She threatened, you know, not to pursue request under New York State labor law. She said she would get a time clock Made no difference to me, but that was, you know, in . . . an effort in retaliation to—to speak of our rights under New York State labor law." Biegel testified that he spoke to Blauberg about the issue of compensable pay and his belief that New York State labor law required him to receive four hours of pay in the event that he had to return to work in response to an emergency call when he was on-call. He explained that otherwise, it "just doesn't make financial sense" for him to drive two hours from his home to work to receive a half-hour of pay.

Biegel continued:

I realize that this Board doesn't enforce New York State labor law, but it does—it is a part of the basis of what I contend is an act of retaliation ultimately leading to a few days before I was terminated. I spoke to Ms. Blauberg and stated to her my rights in exercising either forming or joining a union for the employees of Catskill Housing Authority. She said to me, suffice to say, if you try, I will fire you, and she did exactly that.³

Blauberg denied that she made any anti-union remarks at all, and that the only conversation she had with Biegel regarding unions was limited to his informing her he had been a union member while he was a corrections officer.⁴

³ 49 PERB ¶ 4534, at 4606 (footnotes and citations omitted).

⁴ *Id.*, at 4607; see also Tr, at pp. 137-139.

DISCUSSION

When an improper practice charge alleges unlawfully motivated retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken “but for” the protected activity.⁵ As we have often reaffirmed, “[t]he ultimate burden of proof always remains with the charging party.”⁶

The initial burden of proof to establish a *prima facie* case (an inference of improper motivation) is relatively low.⁷ The “ALJ is required to accept the charging party’s evidence as true, and give it the benefit of every reasonable inference that can reasonably be drawn from that evidence.”⁸

Only “if the charging party can establish such an inference, does the burden of production shift to the respondent to present evidence demonstrating that its conduct

⁵ *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015); citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); see generally *UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021 (2013); see also *City of Salamanca*, 18 PERB ¶ 3012 (1985).

⁶ *Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015); see also *Village of Endicott*, 47 PERB ¶ 3017, at 3050 (quoting *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3043).

⁷ *Id.* (citing, *inter alia*, *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3043; *Bd. of Educ. of the City Sch. Dist. of the City of New York (Grassel)*, 43 PERB ¶ 3010 (2010); *Town of Tuscarora*, 45 PERB ¶ 3044 (2012); *Bd of Educ of the City Sch Dist of the City of New York (Guttman)*, 46 PERB ¶ 3008 (2013).

⁸ *Id.*, quoting *Town of Tuscarora*, 45 PERB ¶ 3044, at 3112 (citing *Board of Ed of the City Sch Dist of the City of New York (Baez)*, 35 PERB ¶ 3044 (2002) and *Board of Ed. of the City Sch. Dist. of the City of New York (Freedman)*, 34 PERB ¶ 3036 (2001)).

was not improperly motivated.”⁹ While we have often described this as a “burden of persuasion,” such usage does not alleviate the charging party’s obligation to prove the elements of the charge. Rather, the burden of proof at all times rests with the charging party to prove all three elements by a preponderance of the evidence.¹⁰ Thus, the employer can dispel the *prima facie* case, and defeat the charge, by rebutting any of the three prongs of the *prima facie* case or the presentation of “evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason.”¹¹ If the respondent establishes a legitimate non-discriminatory reason, then the burden shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual.¹² When a charging party fails to meet its burden, a charge of improper motivation must be rejected and the charge dismissed.¹³

The ALJ’s key finding here is that Blauberg testified truthfully that Biegel never spoke to her about joining or forming a union. This finding, if well founded, rebuts Biegel’s *prima facie* case that (1) Blauberg was aware of protected activity on his part, and (2) motivated by his protected activity in terminating him. Thus, the crux of the exceptions before us is Biegel’s claim that the ALJ erred in crediting Blauberg’s testimony over Biegel’s as to the tenor of their discussions prior to the decision to terminate his employment.

Credibility determinations by an ALJ are generally entitled to “great weight unless

⁹ *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037; see generally *Littlejohn v. City of New York*, 795 F3d 297, 307-308 (2d Cir. 2015).

¹⁰ *Elwood Union Free Sch. Dist.*, 43 PERB ¶ 3012 (2010).

¹¹ *Dutchess Community College*, 47 PERB ¶ 3018, 3056 (2014), citing *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3018.

¹² *Bellmore-Merrick Cent Sch. Dist.*, 48 PERB ¶ 3022, at 3076.

¹³ *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037, citing *State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021, 3040 (2013); *County of Tioga*, 44 PERB ¶ 3016 (2011)).

there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect. This is especially true where, as here, the credibility determination rests in part on the witness' demeanor."¹⁴ Here, Biegel has not provided any such objective evidence that establishes that the ALJ manifestly erred.

Moreover, the ALJ did not rely on demeanor alone, but also on the fact that Biegel's February 27, 2014 letter to the Authority requesting reinstatement claimed Blaumberg retaliated against him for complaining about violations of various state and federal laws, but did not include any claim of a violation of the Act.¹⁵ The ALJ found that Biegel's omission of any such claim from his earlier written statement was inconsistent with his testimony, and drew that testimony's credibility into question. Biegel has at most pointed to evidence that would have, if credited, supported a contrary determination by the ALJ. We therefore decline to overturn the ALJ's credibility determination and his resultant factual finding that Blaumberg did not know of any protected activity on the part of Biegel.¹⁶

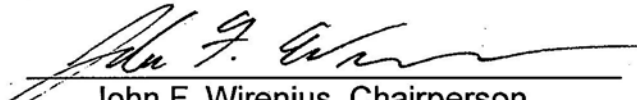
¹⁴ *Bellmore-Merrick Cent Sch. Dist.*, 48 PERB ¶ 3002, at (quoting *UFT (Cruz)*, 48 PERB ¶ 3004 (2015)); see also *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014) and *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019 (2008); citing *County of Tioga*, 44 PERB ¶ 3016, at 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977); see also *County of Ulster*, 39 PERB ¶ 3013, at 3045-3046 (citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974)) (deference due credibility determinations based on observation of witness's demeanor).

¹⁵ Charge, Ex. A.

¹⁶ Biegel's final exception, contending that this Board should not exercise jurisdiction based on a purported inherent conflict of interest in is without merit; § 205.5 (d) of the Act confers upon the Board "exclusive non-delegable jurisdiction" over improper practice claims.

Accordingly, we deny the exceptions, affirm the decision of the ALJ, and dismiss Biegel's improper practice charge.

DATED: September 20, 2016
Albany, New York



John F. Wirenius, Chairperson



Allen C. DeMarco, Member



Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

QUINTON WATERS,

Charging Party,

CASE NO. U-33639

- and -

**TRANSPORT WORKERS UNION OF GREATER
NEW YORK, LOCAL 100, AFL-CIO,**

Respondent,

- and -

THE NEW YORK CITY TRANSIT AUTHORITY,

Employer.

QUINTON WATERS, Charging Party *pro se*

**URSULA LEVELT, MANAGING DIRECTOR (DAMIAN TREFFS,
of counsel), for Respondent**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Quinton Waters to a decision and order of an Administrative Law Judge (ALJ) dismissing his improper practice charge, alleging that the representation provided him by the Transport Workers Union of Greater New York, Local 100, AFL-CIO (“TWU”) in a grievance with his employer, the New York City Transit Authority (NYCTA), breached the duty of fair representation in violation of §§ 209-a.2 (a) and (c) of the Public Employees’ Fair Employment Act (Act).¹ The ALJ found that Waters had not filed the charge in a timely manner, in that more than four

¹ 49 PERB ¶ 4549 (2016).

months had elapsed between the last alleged act and the filing of the charge.

EXCEPTIONS

Waters excepts to the ALJ's decision on several grounds. First, he contends that as NYCTA had ordered him to keep it informed as to the status of extrinsic litigation giving rise to the disciplinary charges against him, and because he was represented on an ongoing basis by the TWU, "I say that I did not file my charges beyond the four month limitation." Additionally, Waters contends that the disciplinary charges against him were the subject of ongoing negotiations. For the reasons set forth below, we affirm the ALJ's decision and dismiss the charge.

DISCUSSION

The record reflects that the ALJ's decision was sent to Waters via certified mail on June 10 and received by him on June 14, 2016. Waters's exceptions were dated and filed on June 16, 2016, and thus were timely filed with the Board. However, no proof of service upon the other parties was provided as required by § 213.2 (a) of our Rules of Procedure (Rules). On July 6, 2016, PERB's counsel sent a letter to Waters that pointed out this omission and gave him an opportunity to provide the requisite proof of service by July 14, 2016. On July 9, Waters replied, in a letter he sent by facsimile to counsel on July 11. Waters's letter stated that he had sent copies of his exceptions by electronic mail to the other parties at "about the same time" he had filed the exceptions, although no proof of such delivery by e-mail was attached. Waters's letter also attached proof that he mailed the decision to the TWU and NYCTA on July 9, 2016.

Section 213.2 (a) of the Rules provides that exceptions must be filed "[w]ithin 15

working days after receipt of a decision,” and that proof of such service “shall be filed with the board.” As the ALJ’s decision was received on June 14, the exceptions were due to be filed and served on all parties no later than July 6, 2016. The Board has long held that “[t]imely service of exceptions upon all other parties is a necessary component for the filing of exceptions under the Rules, and this timeliness requirement is strictly applied.”² Thus, on the record before us, Waters’s exceptions were not timely and therefore must be denied.³

In view of Waters’s *pro se* status, we have examined the exceptions and the record, and “we are unable to discern an arguably meritorious basis for [his] challenge to the ALJ’s decision.”⁴ Even if the record before us established timely service of the exceptions, we would affirm the ALJ’s decision on the merits.

The ALJ correctly held that the charge was untimely. The last act or omission alleged took place in November 2013; the charge was filed on June 26, 2014, or approximately eight months after the last act or omission alleged.⁵ Waters does not claim any subsequent act or omission complained of was overlooked by the ALJ in her decision. Rather, he claims that his continued representation by the TWU acted in some manner to extend his time in which to file the charge. Waters may be relying on a

² *UFT (Gibson)*, 48 PERB ¶ 3015, 3053-3054 (2015), quoting *State of New York (Commission of Correction)*, 47 PERB ¶ 3019, at 3058 (2014) (citing *UFT (Pinkard)*, 44 PERB ¶ 3011, 3042 (2011); *UFT (Elgalad)*, 43 PERB ¶ 3028 (2010)); see generally *UFT (Hunt)*, 48 PERB ¶ 3005 (2015); *Honeoye Falls-Lima Cent Sch Dist (Malcolm)*, 41 PERB ¶ 3015 (2008); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶ 3037 (2002); *Yonkers Fedn of Teachers (Jackson)*, 36 PERB ¶ 3050 (2003).

³ *UFT (Hunt)*, 48 PERB ¶ 3005, at 3012.

⁴ *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014).

⁵ ALJ Ex. 1; Charging Party, Ex. 7.

“continuing violation” theory, which in some areas of law allows a plaintiff to collect all damages resulting from a single ongoing violation of his rights that commenced outside the relevant limitations period, as long as some act giving rise to the violation occurred during the limitations period.⁶ However, the Board has consistently declined to apply a continuing violation theory to extend our statute of limitations.⁷

Moreover, the record before us does not demonstrate a meritorious claim untimely filed. The Board has often reaffirmed that “to establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization’s conduct or actions are arbitrary, discriminatory or founded in bad faith.”⁸

As we have previously explained, the courts have:

reject[ed] the standard . . . that “irresponsible or grossly negligent” conduct may form the basis for a union’s breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to

⁶ *American Trucking Assns, Inc. v. NYS Thruway Auth*, ___ F. Supp3d ___, 2016 WL 4275435, at *9 (Aug. 10, 2016).

⁷ See, e.g., *City of Yonkers*, 7 PERB ¶ 3007 (1974); *Village of Malone*, 8 PERB ¶ 3045 (1975); *UUP (Iden)*, 13 PERB ¶ 3086 (1980); *Triborough Bridge and Tunnel Auth*, 17 PERB ¶ 3017 (1984); *NYCTA*, 26 PERB ¶ 3081 (1993); *State of New York (Dept of Ins)(Shayne)*, 36 PERB ¶ 3026 (2003); *CUNY*, 40 PERB ¶ 3004 (2007).

⁸ *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016), quoting *UFT (Cruz)*, 48 PERB ¶ 3004, 3010, *petition denied*, *Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct NY Co 2015) (internal quotation and editing marks omitted), quoting *UFT (Munroe)*, 47 PERB ¶ 3031, 3095 (2014), *petition denied*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (quoting *CSEA (Bienko)*, 47 PERB ¶ 3027, 3082-3083 (2014)); see *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).

establish an improper practice by the union.⁹

Thus, “an employee’s mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.”¹⁰

Waters has neither expressly alleged nor provided any basis upon which we could conclude that the representation was tainted by any “arbitrary, discriminatory or bad-faith conduct” sufficient to violate the duty of fair representation. In his exceptions, Waters blanketly asserts that TWU “union officers are corrupt,” but has provided no evidentiary basis for this assertion, nor does any such basis appear in the record. Such “conclusory allegations are insufficient to plead, let alone prove, a violation of the duty of fair representation.”¹¹

The charge does not assert that the TWU’s representation was arbitrary, discriminatory or in bad faith. At the hearing, Waters agreed with the ALJ when she asked him if he was contending that the TWU’s representation of him had been negligent.¹² Likewise, in his closing statement, Waters explained that it was the TWU’s

⁹ *Id.*; see also *Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, 3026 (2014) (quoting *CSEA, L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD 2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).

¹⁰ *Id.*

¹¹ *Elwood Teachers Alliance (Neithardt)*, 48 PERB ¶ 3020, 3067 (2015), citing *UFT (Leon)*, 48 PERB ¶ 3018, at n. 19 (quoting *UFT (Munroe)*, 47 PERB ¶ 3031, 3095 (2014)); *confd sub nom Munroe v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (citing *PEF (Goonewardena)*, 27 PERB ¶ 3006 (1994)); see also *UFT (Arredondo)*, 48 PERB ¶ 3010, 3034 (2015) (same).

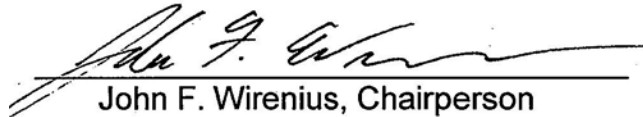
¹² Tr, at pp. 16, 64.

“job to support me as a Union member and they just failed.”¹³

In sum, the evidence as a matter of law does not establish that the TWU’s actions were “arbitrary, discriminatory or founded in bad faith” as required to establish a breach of the Act.¹⁴ Based upon the foregoing, we deny the exceptions, affirm the decision of the ALJ, and dismiss the charge.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: September 20, 2016
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

¹³ Tr, at pp.76-77.

¹⁴ *Elwood Teachers Alliance (Neithardt)*, 48 PERB ¶ 3020, at 3067, citing *CSEA (Bienko)*, 47 PERB ¶ 3027, at 3082-3083, quoting *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).